14

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

HOLLAND FURNACE COMPANY, a Corporation,
Petitioner,

v.

DEPARTMENT OF TREASURY OF THE STATE OF INDIANA, HENRY F. SCHRICKER, JAMES GIVENS, AND RICHARD I. JAMES, as and Constituting the Board of the Department of Treasury of the State of Indiana,
Respondents.

No. 164

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INDEX

CITATIONS

Page

Cases:

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A.

SUMMARY STATEMENT OF MATTERS INVOLVED.

The Facts.

Petitioner's statement of the facts is substantially correct. However, petitioner's statement contains certain conclusions of petitioner.

With respect to petitioner's offer to apportion, referred to by petitioner at page 4 of its petition herein, the Record shows the following:

"Said defendant Department of Treasury, by letter dated October 27, 1941, refused to consider any apportionment of the receipts in this matter.

"The Department took the view that the activity of the plaintiff was that of a contractor performing a contract within the State of Indiana and as such did not come within the purview of the commerce clause; that the gross income tax law of Indiana with respect to tax upon gross receipts derived from the performance of contracts within the confines of the State of Indiana, did not, in the opinion of the Department, permit an apportionment of the tax, and such prohibition did not conflict with the due process clause; it concluded that the weight of authority seemed to justify the assumption that the state in which the contract was fulfilled was entitled to use the entire gross receipts from such a source measuring the tax to be imposed upon activities within the taxing state."

Finding X, Record, pp. 28-30.

The Issues.

Petitioner's statement of the issues and questions presented is substantially correct.

Statutes.

Pertinent sections of the Indiana Gross Income Tax Act of 1933, and that Act, as amended, are set out in full in Appendix, *infra*, pp. 21-23.

B.

SUMMARY OF ARGUMENT.

One.

The levy of the tax here does not violate the Commerce Clause.

The State of Indiana is not prohibited by the Commerce Clause of the Federal Constitution from levying the local tax involved herein, measured by the gross receipts of petitioner from the performance of contracts for the performance of work and installation of heating and air conditioning equipment within the State of Indiana. (Argument, *infra*, pp. 5-12.)

Two.

The levy of the tax is not prohibited by the Fourteenth Amendment and is proper under the terms of the state taxing act.

No portion of the transactions taxed occurred outside Indiana. The gross receipts of petitioner from the performance of its contracts within Indiana were from purely local sources, and, therefore, the taxes herein were properly paid and collected. (Argument, *infra*, pp. 12-18.)

Three.

The tax at the rate of one per cent. is proper.

Petitioner's receipts prior to April 1, 1937 (under the original Gross Income Tax Act of Indiana, Chapter 50, Acts of 1933, p. 389, Section 64-2601 *et seq.*, Burns' Ind. Stat. Ann. 1933 ed.), properly were taxable at the rate of one per cent. (Argument, *infra*, pp. 18-20.)

ARGUMENT.

The Nature of the Case.

Petitioner brought this action in the District Court to recover taxes paid by it under the provisions of the Indiana Gross Income Tax Act of 1933 and that Act as amended. *Chapter 50, Acts of the General Assembly of 1933, p. 389; Chapter 117, Acts of the General Assembly of 1937, p. 606: Sec. 64-2601 et seq. Burns' Ind. Stat. Ann. 1933 ed. and Pocket Suppl.*

The District Court referred the case to a Special Master and in due course the Master reported findings of fact and conclusions of law in this case which were adopted by the Court. The conclusions of law were in favor of defendants (respondents) and judgment was rendered accordingly. The Circuit Court of Appeals for the Seventh Circuit affirmed the decision of the District Court. 133 Fed. (2d) 212.

The petitioner, Holland Furnace Company, is a Michigan corporation admitted and qualified to do business in Indiana. It maintained sales offices at various Indiana cities and towns. It manufactured heating and air conditioning equipment and supplies outside Indiana.

All of the gross income which formed the measure of the taxes in controversy consisted of total amounts specified in contracts entered into through petitioner's Indiana branches direct with its Indiana customer, no contracts having been made with or sales having been made to dealers or jobbers.

The contracts solicited by petitioner's employees or agents within Indiana were in the form set out in full in the Record. *Finding IV, Record, pp. 23-25.*

All emphasis is that of respondents, unless otherwise stated.

It is the position of the State that the gross receipts of petitioner from the performance of its contracts in Indiana were the proper measure of the state tax involved.

One.

The levy of the tax does not violate the Commerce Clause.

A. THE GROSS RECEIPTS OF PETITIONER WERE FROM LOCAL ACTIVITIES.

The respondents insist that there is no serious question of interstate commerce involved here. The gross receipts of the Holland Furnace Company, derived in the manner described in the findings of the Court below, properly may be the measure of this state privilege tax, inasmuch as all of said receipts were derived from the performance of work and labor and the furnishing of materials within Indiana.

There is a real and substantial difference between a "contract for work, labor and materials" and a "contract of sale." The Holland Furnace Company sends its property into the State of Indiana and reserves title thereto until it is fully paid for, the time of such payments not being definitely shown but in contemplation extends over a period of at least several months. All of this time its property is protected by Indiana laws. Protection against default by its purchasers must be obtained from Indiana courts—its property has fully come to rest in Indiana and is under the protection of the state. The contract between petitioner and its customers clearly contemplates that the property definitely comes to rest in Indiana.

The fact is that the State of Indiana has and should have the right to apply its gross income tax to business actually transacted within the state, notwithstanding the fact that "interstate" commerce may have intervened at some point in the transaction, as an incident, and the additional fact that the taxpayer may have incurred expenses in some other state preparatory to the performance of its contracts in Indiana with its Indiana customers.

The Holland Furnace Company's contract obviously is not a contract for the sale of a thing, but by all the ordinary rules of construction must be properly recognized to be a contract to perform certain work and labor and furnish certain materials at a specified place in Indiana, *i. e.*, locally.

As a matter of fact, what the petitioner agreed to do, *and that for which it was compensated*, was to furnish its Indiana customers with heating plants installed within their Indiana premises. With respect to the receipts involved here petitioner performed no gross income-producing activities outside Indiana.

The tax is purely and simply upon the Indiana activities of petitioner. It could have *manufactured* millions of furnaces at Holland, Michigan, and brought them into Indiana and yet never have been liable for one cent of gross income tax. But—if it obtained contracts in Indiana, maintained numerous sales offices in Indiana, and performed its contracts in Indiana by furnishing and installing such furnaces and other equipment, and received gross receipts therefor, this petitioner, exactly the same as any other contractor, engaged in Indiana in a peculiarly local business, is and should be subject to this state tax.

Petitioner's contract provides striking proof of the correctness of our contentions. Petitioner agreed to and did

perform in Indiana the contract which was the source of the *gross receipts* which formed the measure of the tax: "We, Holland Furnace Co. (seller), propose and agree to furnish and install ——— furnaces at ———." *(Always an Indiana location.)* (Finding IV, Record, p. 23.)

Petitioner's gross receipts involved here accrued directly as the result of the activities which it performed in Indiana: furnishing materials installed in Indiana structures. Certainly, by no stretch of the imagination, could such transactions be considered outside the scope of the state's power to tax. The full measure of the Indiana tax is based upon Indiana activities—not upon anything done by petitioner outside the state, or upon the basis of any of its dealings outside the state. Cf. *Stone* v. *York Ice Machinery Corp.* (Miss.), 10 So. (2d) 380; *James* v. *Dravo Contracting Co.*, 302 U. S. 134.

Petitioner cites several cases to support its proposition that the receipts of Holland Furnace Company were from the interstate sale of goods.

All of these cases are conditioned upon the theory that a state cannot require a corporation doing business having multistate characteristics to acquire a *license* in order to carry on a portion of its business within the state or make an enforceable contract within the state without first obtaining a license. *None of such cases cited are tax cases,* and they should not be controlling here.

An outstanding example of the type of cases cited by petitioner, although not herein cited, is the case of *Dahnke-Walker Milling Co.* v. *Bondurant,* 257 U. S. 282. However, holding that a corporation may solicit and perform contracts within a state without leave of the state is far from holding that a state may not levy a general, non-discrimina-

tory tax, measured by gross receipts from transactions like those now before the Court.

The Court has had this to say with reference to the *Dahnke-Walker* case:

> "But *that case was not concerned with the power to tax,* but rather with the power of a state to prevent an engagement in interstate commerce within her limits, except by her leave."
>
> *Sonneborn Bros.* v. *Cureton,* 262 U. S. 506, 514.

In the instant case, all of the work for which payment was received was done in Indiana by Holland Furnace Company.

B. THIS INDIANA TAX, MEASURED BY PETITIONER'S GROSS RECEIPTS, IS NOT PROHIBITED BY THE COMMERCE CLAUSE.

While respondents earnestly contend in this case that the gross receipts of petitioner are from activities strictly local in character, if the transactions are found to have any "interstate" characteristics respondents submit that petitioner is not engaged in such commerce as Indiana is prohibited from taxing by reason of the Commerce Clause of the Federal Constitution.

The case of *Adams Manufacturing Company* v. *Storen* (1938), 304 U. S. 307, does not prohibit the application of the Indiana tax measured by petitioner's gross receipts from contracts performed within Indiana. In that case, this same tax was held to be invalid when laid by the State of Indiana upon receipts from sales of goods manufactured in Indiana and sold in other states.

The *Adams* case establishes the principle that the seller's state is prohibited by the Commerce Clause from imposing a tax upon the gross receipts from sales of goods in another state. *McGoldrick* v. *Berwind-White Coal Mining Company* (1940), 309 U. S. 33, 57.

It is a proposition of law no longer questioned that the mere formation of a contract between persons in different states does not make the contract a subject of protection of the Commerce Clause, at least in the absence of congressional action, when, as is the case here, the contract is to be performed wholly within the borders of one state. This is true although the contract incidentally may affect interstate trade. *McGoldrick* v. *Berwind-White Coal Mining Company* (1940), 309 U. S. 33; *Western Live Stock* v. *Bureau of Revenue* (1938), 303 U. S. 250, 251; *Ware & Leland* v. *Mobile County* (1908), 209 U. S. 405, 409; *Paul* v. *Virginia* (1869), 8 Wall. 168; *Indiana Farmers Guide* v. *Department* (1940), 217 Ind. 627, 29 N. E. (2d) 781, 784.

The Commerce Clause does not in terms prohibit state taxes. *Swift* v. *U. S.* (1905), 196 U. S. 375, 399; *Western Live Stock* v. *Bureau of Revenue* (1938), 303 U. S. 250, 254.

State taxes, measured by gross receipts, have been uniformly upheld where there has been no possibility, as here, that the transaction taxed could bear any greater burden than transactions having absolutely no extrastate characteristics.[1]

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[1] *Woodruff v. Parham*, 8 Wall. 123; *Hinson v. Lott*, 8 Wall. 148; *Banker Brothers v. Pennsylvania*, 222 U. S. 210; *Wiloil Corporation v. Pennsylvania*, 294 U. S. 169; *Sonneborn Brothers v. Cureton*, 262 U. S. 506, 514; *Graybar Electric Company v. Curry*, — Ala. —, 189 So. 186, 308 U. S. 513; *McGoldrick v. Berwind-White Coal Mining Company*, 309 U. S. 33; *Department of Treasury v. Allied Mills, Inc.*, — Ind. —, 42 N. E. (2d) 34, 63 S. Ct. 666. Cf. *Wisconsin v. J. C. Penney Company*, 311 U. S. 435; *Nelson v. Sears, Roebuck & Company*, 312 U. S. 359.

It is the *effect* of a local tax upon commerce in which the court has been interested and, in the past when the possible effect of a state tax has been to place so-called "interstate" commerce at a disadvantage, competitively, with purely local trade, the mere fact that the tax was conditioned on a local event did not save it. Contrarywise, where the *effect* of the tax has been to place transactions having incidental extrastate elements on an equal basis, taxwise, with purely local trade, the tax has been sustained. The tax here is valid and withstands all of the tests prescribed by the Court.

Obviously, the tax in this case is "conditioned upon a local event." *Miles* v. *Department of Treasury of Indiana, et al.* (1935), 209 Ind. 172, 199 N. E. 372.[2] *See also: Sec. 2, Chap. 117, Acts of the General Assembly of Indiana of 1937, p. 611: Sec. 64-2602, Burns' Ind. Stat. Ann. 1933 ed. Pocket Suppl.; Sec. 2, Chap. 50, Acts of the General Assembly of Indiana of 1933, p. 390: Sec. 64-2602, Burns' Ind. Stat. Ann. 1933 ed.; Department of Treasury* v. *Allied Mills, Inc.* (1942), — Ind. —, 42 N. E. (2d) 34; *Western Live Stock* v. *Bureau of Revenue* (1938), 303 U. S. 250, 254.

The matter which the statute authorizes as the taxable activity is a thing which occurs in Indiana, either doing

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2 In the *Miles* case, supra, the Supreme Court of Indiana said:

> "We conclude that the tax in question is an excise, levied upon those domiciled within the state or who derive income from sources within the state upon the basis of the privilege of domicile or the privilege of transacting business within the state, and that the burden may reasonably be measured by the amount of income. The reasoning which justifies a tax upon the basis of domicile as readily supports and justifies a tax upon the basis of the right to receive income within, or transact business under the protection of, the state." (199 N. E. at 379.) Without any question, the gross receipts of petitioner from performing its contracts in Indiana were from Indiana sources, and in fulfilling its contracts petitioner was unquestionably transacting business within Indiana.

business within the state or deriving income from sources within the state.

The Indiana statutes involved herein levy a tax

> "measured by the amount or volume of gross income * * *. Such tax shall be levied * * * upon the gross income derived from sources within the State of Indiana of all persons and/or companies, including banks, who are not residents of the State of Indiana, but are engaged in business in this state, or who derive gross income from sources within this state, * * *." *Sec. 2, Chap. 50, Acts of 1933, p. 390: Sec. 64-2602, Burns' Ind. Stat. Ann. 1933 ed.*

The 1937 amendment does not change the nature of the tax. (See Appendix, *infra*, p. 23.)

All of petitioner's gross receipts were derived from the performance of its contracts within Indiana. (Finding IV, Record, pp. 22-26.) Therefore, Petitioner was plainly subject to the acts because it was engaged in business within the state and derived gross income from Indiana sources (*i. e.*, from the performance of its contracts). The taxes here, levied pursuant to ample state power and not prohibited by any constitutional provisions sought to be invoked by petitioner, were properly paid and collected.

The case of *Allied Mills, Inc.* v. *Department of Treasury*, — Ind. —, 42 N. E. (2d) 34, 63 S. Ct. 666, 87 L. ed. 514, supports the position of respondents, and is of no aid to petitioner.

The case of *Department of Treasury* v. *International Harvester Company*, — Ind. —, 47 N. E. (2d) 150, does not support the position of petitioner. The Indiana Supreme Court described Class A Sales as

> "Sales by branches located outside Indiana to dealers and users located in Indiana. These sales were made on orders solicited in Indiana by representatives of out-of-state branches, or upon mail orders sent from Indiana to out-of-state branches. The orders were accepted by the outside state branch offices and the purchase money paid to them. Without direction from the purchasers, the goods were shipped to them in Indiana from branches, warehouses or factories located outside Indiana."

This is the class of sale in the cited case about which the Indiana Supreme Court said merely: "We cannot say that income so received by appellees was derived from sources within the State of Indiana."

Here, the factual situation is substantially different. The taxpayer installs equipment which it manufactured outside Indiana in the buildings of its Indiana customers in Indiana. Its entire gross receipts are received from the performance of work and labor and the furnishing of materials incident thereto *in Indiana*. So far as petitioner's contracts are concerned, nothing is required of it by such contracts that petitioner does not do in Indiana. Because of the difference in the factual situations in the *International Harvester Company* case and here, the case cited by petitioner is neither applicable nor controlling in this case.

Two.

The levy of the taxes here is not prohibited by the Fourteenth Amendment and is proper here under the terms of the Taxing Act.

The Gross Income Tax Act levies "a tax, measured by * * * gross income * * * derived from sources within

the State of Indiana of all persons and/or companies * * * who are not residents of the State of Indiana, but are engaged in business within the state, or who derive gross income from sources within this state * * *." *Sec. 2, Chap. 50, Acts of General Assembly of 1933, Sec. 64-2602 Burns' Ind. Stat. Ann. 1933 ed.* (The 1937 Act, Chap. 117, Acts of the General Assembly of 1937, is substantially the same. Appendix, *infra*, p. 23.)

Petitioner contends that Michigan was the source of part of its receipts. That is not the case, for that merely was where this petitioner incurred certain *expenses.* For example, it would be well to examine the various items of expense contained in the findings of the Court below. In Finding XI, Record, p. 30, there is an analysis of petitioner's receipts. Each item contained in the analysis is an *expense* item, with the exception of the item of "profit and miscellaneous." It is obvious that petitioner is not here seeking to show, nor is it shown by the schedule, that any of petitioner's receipts are from sources outside Indiana. What petitioner has shown and all that it has shown, is that it has incurred certain *expenses* outside Indiana, which it is now seeking to *deduct.*

We feel it necessary to point out here that the Indiana tax is upon a privilege *measured by gross receipts,* and the General Assembly, in levying the tax, possessed ample power to establish the measure thereof. The Act specifically states:

> "The term 'gross income' * * * means the gross receipts of the taxpayer * * * without any deductions on account of the return of capital invested, the cost of the property sold, the *cost of materials used, labor cost,* interest, discount or com-

missions paid or credited and without any deductions on account of losses, and without deductions of any kind or character * * *." *Section 1 (m), Chap. 117, Acts of General Assembly of 1937. Sec. 64-2601 (m), Burns' Ind. Stat. Ann. 1933 ed., Pocket Suppl.* (The 1933 Act contains substantially the same clause.)

The petitioner has lost sight of the nature of the Indiana tax. It is a privilege tax upon the receipt of income. *Miles v. Department of Treasury* (1935), 209 Ind. 172, 199 N. E. 372.

Here, the measure of the tax is the gross receipts from contracts completely performed within Indiana. The fact that petitioner incurred certain expenses outside Indiana does not entitle it to deduct from its gross receipts the amounts of such expenses in determining its tax. As a matter of fact, under the Indiana statute it would not be permitted to deduct from its gross receipts its expenses, even if incurred within Indiana, in determining its tax.

Petitioner is taxable under the plain terms of the Act. The original Gross Income Tax Act provided that:

> "The term 'gross income' * * * means the gross receipts of the taxpayer received in compensation for personal services and the gross receipts of the taxpayer derived from trades, *businesses or commerce,* and the gross receipts from the *sale of property,* tangible or intangible, real or personal, *and service, or any or* all of the foregoing * * *."

Sec. 1 (f), Chap. 50, Acts of General Assembly of 1933, 11 Burns' Ind. Stat. Ann., 1933 ed., Sec. 64-2601 (f).

The amended Act provides:

> "The term 'gross income' means the gross receipts of the taxpayer received as compensation for personal services * * * and the gross receipts of the taxpayer received from trades, businesses or commerce * * * *all receipts from the performance of contracts* * * *."
>
> Sec. 1 (m), Chap. 117, Acts of General Assembly of 1937, 11 Burns' Ind. Stat. Ann., 1933 ed., Pocket Suppl., Sec. 64-2601 (m).

It is obvious that petitioner comes within the terms of the Acts.

Petitioner cites the case of *Hans Rees' Sons* v. *North Carolina,* 283 U. S. 123, involving net income taxes. In the case of *Dravo Contracting Company* v. *James,* 114 Fed. (2d) 242 at 246, *cert. den.* 312 U. S. 678, 61 S. Ct. 450, the Court had this to say with reference to the *Hans Rees' Sons* case:

> "It constitutes no authority for the proposition that the state may not impose a tax on the basis of income received from payments made upon the delivery or construction within the state because work may have been done in other states upon the materials prior to their delivery. The holding in the *Hans Rees'* case is that a state income tax, if upon a unitary enterprise conducted in several states, is void if it allocates an unreasonable portion of the income to the taxing state. The tax here is not upon a unitary enterprise conducted in several states, but upon the business of contracting within West Virginia, and income derived from that business is properly subject to taxation by the state."

In discussing the case of *South Carolina Power Co.* v. *South Carolina,* 52 Fed. (2d) 515, 288 U. S. 178, the same Court went on to say in that case at p. 247:

> "Just as it was there held that a state may tax what is carried on within its borders, although this may be dependent upon transactions extending beyond them, so also the power to tax income derived from contracting within the state is not affected by the fact that materials may have been brought from without the state, or that they may have been prepared without the state by the contractor for use under the contract. Only where income arising from a contract performed within the state accrues upon a separable out-of-state transaction should it be excluded as not being income arising from contracting within the state."
>
> Cf. *Indiana Farmers' Guide* v. *Department of Treasury,* 217 Ind. 627, 639, 29 N. E. (2d) 781.

Respondents submit that no portion of the activities taxed occurred outside the jurisdiction of the State of Indiana, and therefore, that the tax in each case was properly collected.[3]

The petitioner cites, in support of its proposition that the instant taxes are not proper because of the due process clause of the Fourteenth Amendment to the Constitution, several cases which may be divided into two groups: first, those in which the tax being considered was a *net income tax,* and, second, those in which the levy being considered was a corporate franchise levy. It is the position of respondents here that neither class of authority should con-

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[3] Cf. *James v. Dravo Contracting Co.,* 302 U. S. 134; *Stone v. York Ice Machinery Corp.* (Miss.), 10 So. (2d) 380.

trol these actions involving a state privilege tax measured by gross receipts.[4]

The case of *Jackling* v. *State Tax Commission,* 40 N. M. 241, 58 P. (2d) 1167, cited in petitioner's brief, for the purpose of defining "source," contains the following language which perfectly describes petitioner's receipts here as being from Indiana sources:

> "A place where something is found or whence it is taken or derived."
>
> (58 P. (2d) at 1171.)

Certainly, petitioner's receipts are not "found" or "taken" or "derived" in Michigan but in Indiana.

The case of *Connecticut General Life Insurance Company* v. *Johnson,* 303 U. S. 77, cited by petitioner involved a situation where nothing whatever was in the taxing jurisdiction and, hence, there was no local privilege exercised for which a tax might lawfully have been exacted.

As the Court there said:

> "*All* that appellant did in effecting the reinsurance was done outside the state and for its transaction no privilege or license by California was needful."

Upon the basis of the authorities cited the writ should be denied, the state being free to pursue its own fiscal policies, unembarrassed by the constitutional limitations herein sought to be invoked because it has here exerted its power in relation to opportunities which it has given

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[4] *In re Kansas City Star,* 346 Mo. 658, 142 S. W. (2d) 1029 at 1037; *Sonneborn Bros. v. Cureton,* 262 U. S. 506, at 514; *Swift v. U. S.,* 196 U. S. 375.

and to protection which it has afforded. *Wisconsin* v. *J. C. Penney Co.* (1940), 311 U. S. 435, 444; *Nelson* v. *Sears, Roebuck & Co.* (1941), 312 U. S. 359, 364.

The thing which the statute authorizes as the taxable event is the event which occurs within Indiana in one of two things, either doing business within the state or deriving income from a source within the state. *Sec. 64-2602, Burns' Ind. Stat. Ann. 1933 ed., and Pocket Supp.* Both of these things this petitioner did.

And, the fact that physical receipt of the income may have occurred without Indiana does not permit petitioner to avoid this tax. *Department of Treasury* v. *Wood Preserving Corporation* (1941), 313 U. S. 62, 67.

Three.

Petitioner taxpayer was properly taxable at the rate of one per cent.

Petitioner errs in supposing that the case of *Oster* v. *Department of Treasury* (1941), 219 Ind. 313, 37 N. E. (2d) 528, has any application here. The facts there were that the taxpayer was engaged in fashioning coats and cloaks and other products out of materials which belonged to a Chicago concern, which concern was engaged in the business of selling such finished products. The receipts of the taxpayer were derived from processing of materials which did not belong to him. There was never any transfer of title or ownership of any of the materials, and the work done by Oster was admittedly in the nature of manufacturing.

However, here petitioner is engaged in Indiana in doing certain specified work and furnishing certain specified mate-

rials. Its gross income is derived directly from the performance of its contracts in Indiana. Its activities in that regard are not within the ordinary meaning of "manufacturing" and, if there is a sale of the materials involved there is no question but that the sale is to the ultimate and final consumer, and, as such, a retail sale under this statute (*Adams Mfg. Co.* v. *Storen,* 212 Ind. 343, 7 N. E. (2d) 941, reversed on another point: 304 U. S. 307). Such receipts are properly taxable at the basic rate of one per cent.

Section 3 (a) of the original Gross Income Tax Act (Chap. 50, Acts of General Assembly of 1933, p. 391) does not apply, for petitioner is not engaged in nor does it derive receipts from any business described therein.

The section of the Act relied upon by petitioner has been construed, administratively and judicially, to include only "manufacturing." It has never been construed to include such receipts as are involved herein.[5]

Under the tax statute, one per cent is the general and basic rate. Certain enumerated types of receipts are taxable at a lesser rate. Petitioner comes within no exception from the basic rate and is, therefore, properly taxable at the one per cent rate.

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[5] Cf. *Department of Treasury v. Ridgely,* 1936, 211 Ind. 9, 4 N. E. (2d) 557; *Clark's Laundry & Dry Cleaning Co. v. Department of Treasury,* 1937, 103 Ind. App. 359, 5 N. E. (2d) 683; *Suabedissen-Wittner Dairy, Inc. v. Department of Treasury,* 1938, 105 Ind. App. 626, 16 N. E. (2d) 964.

The petition for a writ of certiorari should be denied.

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